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In the
Supreme Court of the United States
October Term, 2002

ROGERS MACHINERY CO., INC.,
Petitioner,
v.
CITY OF TIGARD and WASHINGTON COUNTY,
Respondents.

On Petition for Writ of *Certiorari*
to the Oregon Court of Appeals

BRIEF OF *AMICI CURIÆ* NEW ENGLAND LEGAL FOUNDATION AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

May a local government exact development fees it has adopted through a legislative process without complying with the "rough proportionality" standards of *Dolan v. City of Tigard*, 512 U.S. 374 (1994)?

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INTEREST OF *AMICI CURIÆ*[1]

Amici seek to bring to the Court's attention their views, and those of their supporters, concerning the scope of the takings clause under the Fifth and Fourteenth Amendments to the United States Constitution.

Amicus Curiæ the New England Legal Foundation ("NELF") is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who

1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that neither counsel for Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

believe in NELF's mission of promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England, and the United States. NELF's members are affected by the real estate development climate in New England, which depends, in part, upon the extent to which development is hampered by fees that bear no relationship to any adverse impact of the development. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. For those reasons, NELF's members are concerned about the issues presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2000), *cert. denied*, 532 U.S. 1048 (2001); *Greater Boston Real Estate Board v. Department of Telecomm. & Energy*, 438 Mass. 197, 779 N.E.2d 127 (2002); *Chandler v. County Commrs.*, 437 Mass. 430, 772 N.E.2d 578 (2002)

Atlantic Legal Foundation ("ALF") is a nonprofit public interest law firm whose mandate is to advocate and protect the principles of limited government, the free-market system, and individual rights. One of Atlantic Legal Foundation's abiding concerns has been the protection of property rights. ALF has represented property owners in New York in an action challenging the constitutionality of the New York Eminent Domain

Procedure Law and before this Court has represented associations of small property owners located throughout the United States as *amici* in cases involving regulatory takings and the application of this Court's teaching in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See, e.g., Tahoe-Sierra Pre. Council v. Tahoe Envtl. Planning Agency*, 535 U.S. 302 (2002). ALF is concerned that, unless constrained by a requirement to compensate owners of private property, in a majoritarian system government agencies will unfairly allocate disproportionate burdens of achieving public purposes to politically weak segments of the citizenry.

Amici believe that private property and its protection are important building blocks of democracy. Private property helps distinguish individuals' interests from those of the state, and thus acts as a limit on state power. Requiring compensation for generally applicable, but non-proportional, restraints on use and enjoyment of private property will ensure that the burdens of achieving a socially desirable goal will be equitably allocated among all taxpayers, and it will ensure that the electorate makes informed decisions about policy choices and priorities.

Amici Curiæ therefore believe that this brief may provide an additional perspective which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioner, Rogers Machinery Company ("Rogers"). Pursuant to Supreme Court Rule 37.2, counsel for *Amici* have secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of the Petitioner, Rogers Machinery Company ("Rogers").

SUMMARY OF ARGUMENT

The Oregon Court of Appeals erroneously concluded that it could uphold a traffic impact regulation because the relevant government agencies imposed the fee pursuant to a regulation that applied uniformly. This Court should grant the petition for certiorari because the decision below failed to apply *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) simply because the fee was legislative rather than adjudicative in nature. The decision below deprives the *Dolan* standard of meaning and conflicts with the decisions of other state and federal courts. Moreover, the issue before this Court is not unique. Numerous jurisdictions apply disproportionate exactions with their inherently unfair impact, even when applicable courts have addressed disproportionate impacts clearly and directly.

ARGUMENT

I. Rough proportionality is the touchstone in analyzing government requirements that penalize property owners for engaging in permitted development.

Amici contend that the application by Respondents City of Tigard and Washington County of a traffic impact fee that bears no relationship to actual traffic impact violates the Takings Clause of the Fifth Amendment to the United States Constitution (as applicable through the Due Process Clause of the Fourteenth Amendment).

The Hearings Officer who considered Rogers' application to build made an uncontested finding that Rogers' new building would have no impact on traffic because the new building would simply service existing personnel and clientele in a more comfortable surrounding. Petitioner's Exhibit E at 46. Nevertheless, the Oregon Court of Appeals upheld the Respondents' traffic impact fee based on the square footage of Rogers'

proposed new building and not on its traffic impact because the fee was "legislative" rather than "adjudicative." *Rogers Machinery Co. v. Washington County*, 181 Or. App. 369, 397–98, 45 P.3d 966, 982, *review denied*, 334 Or. 492, 52 P.3d 1057 (2002).

Amici contend that an impact fee, such as the traffic fee in this case, that fails to advance its stated goals constitutes a regulatory taking under the standards of *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994). Undoubtedly, minimizing traffic impact is a legitimate government purpose. Unless a regulatory land use exaction (such as a one-time traffic impact fee imposed as a condition for property development) substantially advances its legitimate government purpose, however, the "restriction is not a valid regulation of land use but 'an out-an-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Assocs. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14–15 (1981)).

In order to advance a legitimate government purpose, a government imposition on property development must bear some relationship to the public harm caused by the proposed development. In *Dolan*, this Court described the required nexus between a legitimate state interest and the government regulation intended to advance that interest as "rough proportionality." *Id.*, 512 U.S. at 386.

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the [governmental] require[ment] . . . is related both in nature

> *and extent* to the impact of the [situation giving rise to the desired regulation]. . . . [T]he city must make some effort to quantify its findings in support of the [regulation] beyond [a] conclusory statement.

Id., 512 U.S. at 391, 395-96 (emphasis added).

This case fits easily within the analytical framework in *Nollan* and *Dolan*. The payment by Rogers of a traffic impact fee is a prerequisite to Respondents' approval of Rogers' proposed new building on its property.

Respondents contend, and the lower court held, that the traffic impact fee in this case was "legislative" rather than "adjudicative" and therefore heightened scrutiny under *Dolan* was inapplicable. *Rogers Mach.*, 181 Or. App. at 397–98, 45 P.3d at 982 (relying on *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429, *cert. denied*, 519 U.S. 929 (1996), and *San Remo Hotel v. City of San Francisco*, 27 Cal. 4th 643, 117 Cal. Rptr. 2d 269, 41 P.3d87 (2002)).

Those cases that attempt to imply a legislative/adjudicative distinction into exactions analysis fundamentally misread the relevant language in *Dolan*:

> The sort of land use regulations discussed in the cases just cited, however, differ *in two relevant particulars* from the present case. First they involve essentially legislative determinations *classifying entire areas of the city*, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make

> of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan* . . . we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments.

Dolan, 512 U.S. at 385 (emphasis added].

Thus the trigger for heightened scrutiny under *Dolan* is disjunctive, not conjunctive; in other words *Dolan* applies if the government land use restriction in question is *either* adjudicative *or* an exaction.

The distinction in *Dolan* between legislative and adjudicative conduct is not the simple division made by the court below. The Oregon Court of Appeals in this case called land-use impositions "legislative" if they are generally applicable and "adjudicative" if they involve discretionary determinations. *Rogers Mach.*, 181 Or. App. at 388–89, 45 P.3d at 976. As Rogers points out and the relevant language demonstrates, *Dolan* in fact distinguishes between legislative ordinances that are of continuing application to large areas (such as a zoning ordinance) and adjudicative ordinances in the form of an exaction that apply to individual parcels only on specific occasions (such as on application for a building permit). Rogers' Petition at 11 & n.7. Thus, reading the *Dolan* legislative/adjudicative distinction in context, it is clear that the traffic impact fee is *adjudicative*, even though it is not discretionary, because it applies only when a property owner applies to build a new building or expand an existing one.

This is illustrated by the facts in *Nollan* and *Dolan*, which both involved generally applicable, nondiscretionary impositions. In *Nollan*, the California Coastal Act required *all* property owners in the applicable area who expanded the size of existing homes by 10% to

grant access to the ocean as a condition for granting a building permit. *Nollan*, 483 U.S. at 830. After the enforcing agency enacted regulations implementing the access condition, it imposed the condition on every relevant permit application. *Id.*, at 829. In *Dolan*, the applicable Community Development Code imposed as a condition for *all* building development adjacent to a floodplain a requirement that the property owner dedicate portions of the floodplain and adjacent area to open space and a bicycle path. *Dolan*, 512 U.S. at 379–80.

Finally, the legislative/adjudicative distinction made by the court below between generally applicable and discretionary conduct fails to address this Court's concerns with exactions as regulatory takings. This Court has applied a regulatory takings analysis when a condition for a building permit creates a "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Nollan*, 483 U.S. at 841. A property owner should be essentially indifferent as between a generally applicable fee and a discretionary fee of similar amounts. *See* Inna Reznik, Comment, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 274–75 (2000).

The attempted legislative/adjudicative distinction drawn by the court below is inapplicable in this case because (1) *Dolan*'s legislative/adjudicative distinction does not apply to exactions, (2) *Dolan* considered as "legislative" only ordinances that applied over long periods of time across large sections of a municipality, and (3) under *Nollan*, heightened scrutiny applies whenever the government demands a concession as "a condition to the lifting of a land-use restriction." The decision of the Oregon Court of Appeals below explicitly contradicts the continuing mandate of this Court in

Nollan and *Dolan* and therefore merits review and correction.

II. Repeated attempts by local governments to impose disproportionate impact fees in direct conflict with the takings jurisprudence of this Court and lower courts warrants granting *certiorari* in this case.

Pursuant to Supreme Court Rule 10 (b), *certiorari* is appropriate in this case as the decision of the Oregon Court of Appeals below conflicts with those of other state courts of last resort as detailed in Roger's Petition at 6–10. This Court, over dissent, declined to address the application of the legislative/adjudicative distinction to exactions in *Parking Association of Georgia v. City of Atlanta,* 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting). Since that time, a number of additional jurisdictions have issued decisions that take differing positions, making a grant of *certiorari* by this Court more significant in resolving an open question of constitutional law. *See Rogers Mach.,* 181 Or. App. at 392–93, 45 P.3d at 978.

In addition, *certiorari* is warranted pursuant to Supreme Court Rule 10 (c) as this case raises an important constitutional issue that this Court should address. Despite the counsel of this Court and lower courts to the contrary, as discussed above, numerous municipalities across the country continue to pass new and higher impact fees that bear no relation to a building project's actual impact. The pressure for lower courts to concede without guidance from this Court is significant. For example, prior to this case the Oregon Court of Appeals appeared to reject firmly the legislative/adjudicative distinction in evaluating exactions. *Schultz v. City of Grants Pass,* 131 Or. App. 220, 884 P.2d 569 (1995).

The temptation for municipalities to pass impact fees is understandable. Impact fees provide a way for municipalities to pay for services at a time of decreasing federal and state assistance and strong anti-tax sentiment. Noreen A. Murphy, Note, *The Viability of Impact Fees after* Nollan *and* Dolan, 31 New Eng. L. Rev. 320, 213–15 (1996). Impact fees inevitably discourage development, playing to anti-growth sentiment. *Id.* Moreover, developers are reluctant to challenge impact fees because they often can pass them through to the ultimate buyer of the improved property, increasing the cost of all forms of property, including housing

Although it acknowledged the municipality's "realpolitik" desire to maximize income, the United States Court of Appeals for the First Circuit, referring to *Dolan,* deemed improper a generally applicable impact fee because the "amount bore no relation to the capital expenditures for which [the municipality] could impose [an impact fee] requirement . . . ." *City of Portsmouth v. Schlesinger,* 57 F.3d 12, 17 (1st Cir. 1995). Despite (1) the applicability of *City of Portsmouth* to Massachusetts as a jurisdiction within the First Circuit and (2) voices decrying constitutional problems with non-proportional impact fees, the City of Boston recently raised its "housing and employment exaction requirements" (also called "linkage fees"). *See* 2001 Mass. Stat. c. 170; 1987 Mass. Stat. c. 371, § 3; *South Boston Betterment Trust v. Boston Redev. Auth.,* 438 Mass. 57 (2002); Stephanie Ebbert, *Council OK's Hike in Linkage,* Boston Globe, Oct. 18, 2001, at B2; Stephanie Ebbert, *Senator Faults Menino's Proposal to Raise Linkage Fees,* Boston Globe, May 15, 2001, at B2 (questioning constitutionality of linkage fees); Anthony Flint, *Doubling of Linkage Fees Faces Scrutiny,* Boston Globe, Sept. 9, 2002, at B1. Similar to the exactions in this case, linkage fees in both Boston and Cambridge are based on the square footage

of the proposed project without regard to actual impact. *See* 2001 Mass. Stat. c. 170, § 4; Flint, *supra*.

Given the seductive lure of raising funds without direct costs to the government, municipalities will continue to have incentives to impose non-proportional impact fees. This Court should grant *certiorari* because of the ease with which municipalities can raise funds through impact fees and the practical disincentives for developers to challenge such assessments. This Court's determination could deter the severe economic distortions caused by non-proportional impact fees in the vital real estate development sector.

This case thus raises a matter of national concern that this Court has not previously considered in the context of the forced legislative/adjudicative distinction between otherwise identical impositions on property owners. This Court should therefore grant *certiorari* in this case pursuant to Supreme Court Rule 10 (b) because the decision below conflicts with decisions in other jurisdictions and pursuant to Rule 10 (c) because it raises an important question of federal law.

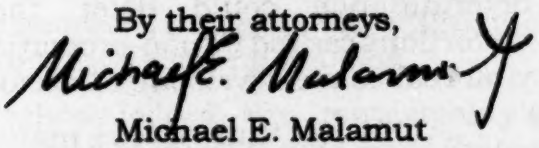
CONCLUSION

For the reasons stated above, this Court should grant Rogers Machinery Company's petition for a writ of *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION and ATLANTIC LEGAL FOUNDATION,

By their attorneys,



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